

**STATE OF TENNESSEE**  
OFFICE OF THE  
ATTORNEY GENERAL  
PO BOX 20207  
NASHVILLE, TENNESSEE 37202

July 9, 2004

Opinion No. 04-108

West Tennessee River Basin Authority - Proposed Stokes Creek Project

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**QUESTION**

The West Tennessee River Basin Authority would like to proceed with a project that would re-establish a meandering channel for Stokes Creek, a West Tennessee stream. The Authority would not be utilizing any federal funding for this project. If the Authority obtains bottomland hardwood timber easements as required for a lateral drain under the Agreed Order in *National Ecological Foundation v. Alexander, et al.*, Civil Action No. 78-2548-H (W.D. Tenn. May 13, 1985), may it proceed without the purchase of additional mitigation lands, or would that violate the Consent Order in *Akers v. Resor, et al.*, Civil Action No. C-70-349 (W.D. Tenn. May 13, 1985)?

**OPINION**

The West Tennessee River Basin Authority may proceed with the Stokes Creek project without purchasing additional mitigation lands as long as it is in compliance with the terms of the May 13, 1985 Agreed Order in *Alexander*, including obtaining the requisite bottomland hardwood easements. The State was not a party to and thus is not subject to the May 13, 1985, Consent Order in *Resor*.

**ANALYSIS**

The West Tennessee Tributary Project (Project) is a plan of the U.S. Army Corps of Engineers (Corps) consisting of channel enlargement on the Obion and Forked Deer Rivers to provide adequate drainage and to reduce the frequency, depth, and duration of flooding in West Tennessee. In 1970 a citizen, Clark Akers, filed suit to challenge the Corps' compliance in implementing the Project with the National Environmental Policy Act and other federal laws in a case styled *Akers v. Resor, et al.*, Civil Action No. C-70-349 (W.D. Tenn.). As a result of this lawsuit, a Consent Order was entered on May 13, 1985. The State of Tennessee was not a party to the *Akers v. Resor* lawsuit and thus is not subject to the Consent Order. The Corps was permitted to proceed with the Project as authorized. The Consent Order required the Corps, in part, to acquire thirty two thousand (32,000) acres of land for mitigation for the impacts to water quality from the

Project. The mitigation was required to be within prescribed boundaries. In implementing the Project, the Corps lets contracts for channel improvements from one particular mile to another, and the geographical limits associated with each contract are called “items.” For each item, the Corps was required to acquire all mitigation lands within the boundaries alluded to above. The Corps purchased approximately 12,000 acres of mitigation lands. No further channelization work has been done by the Corps in a number of years.

The Project was also the subject of litigation in a case styled *National Ecological Foundation v. Alexander, et al.*, Civil Action No. 78-2548-H (W.D. Tenn.). In that matter, an Agreed Order was entered the same day as the aforementioned Consent Order. The Agreed Order outlined the responsibilities of the Obion-Forked Deer Basin Authority (OFDBA) for performing work inside and outside the Project area. The Agreed Order references the recommendations of the West Tennessee Natural Resources Task Force (Task Force) concerning procedures to be followed by OFDBA in performing future work in the Obion-Forked Deer River Basin. *See* Agreed Order, Ex. 1. The Task Force is comprised of representatives from OFDBA, the Tennessee Department of Agriculture, the Tennessee Department of Conservation (now the Tennessee Department of Environment and Conservation) and the Tennessee Wildlife Resources Agency.

The Task Force commissioned a technical work group to survey all the reaches of the rivers outside the Corps’ Project area in the Obion-Forked Deer River Basin and to classify each reach. The classifications were incorporated into the Agreed Order. *See* Agreed Order, Ex. 2. OFDBA must perform any work within these classified reaches in accordance with the methodology required by the Agreed Order and the Task Force. Included is a requirement that prior to beginning any work within these classified reaches, OFDBA must obtain a specified percentage of bottomland hardwood easements from the areas of woodlands and wetlands referenced in the Agreed Order. *See* Agreed Order, Ex. 3. The Agreed Order also references the *Resor* litigation and sets forth OFDBA’s responsibilities for maintaining any channelization work performed by the Corps in the Project area.

In 1996, the Tennessee Legislature amended the statutes governing OFDBA by replacing the authority with a new entity called the West Tennessee River Basin Authority (WTRBA) that is attached to the Tennessee Department of Environment and Conservation. 1996 Tenn. Pub. Acts, ch. 890, codified at Tenn. Code Ann. §§ 64-1-1101 to 64-1-1111. WTRBA assumed the obligations undertaken by OFDBA in the Agreed Order.

In the opinion request, the Department mentions that Stokes Creek is located within the Project area. But according to the stream reach classifications made by the Task Force Technical Work Group, Stokes Creek was outside the Project area in 1985. *See* Agreed Order, Ex. 2. It is our understanding that, in 1996, the Corps internally reformulated the Project and developed two demonstration projects, one of which is along Stokes Creek. However, the Corps failed to commence work for the demonstration project on Stokes Creek.

The Corps was a party to the litigation in *Alexander* and is subject to the Agreed Order. In view of paragraph 12 of the Agreed Order, which states in part, “This Agreed Order shall remain

in effect as presently written and may not be modified, amended or otherwise changed until the completion or abandonment of the Corps of Engineers' project and the acquisition by the Basin Authority of all easements required to complete the Basin Authority's project," we question whether the Corps may unilaterally alter the Project by including waters that were not part of the Project in 1985. However, in light of the Department's question, it does not matter whether Stokes Creek is in the Project area. The requirement to obtain mitigation lands is imposed only on the Corps in the Consent Order and, as stated previously, the State is not obligated under the Consent Order. However, the State must follow the requirements of the Agreed Order.

WTRBA proposes to re-establish a meandering channel for Stokes Creek that will require lateral drain construction. According to the request, WTRBA will not be using any federal funding for this project. The Agreed Order contemplated the WTRBA forerunner's responsibility to include maintenance of channelization work performed by the Corps in the Project area. In this instance, WTRBA's proposed project is not for maintenance work but for re-establishing the meandering channel that would include constructing lateral drainage features. Paragraph 6 of the Agreed Order provides the requirements for the construction of lateral drainage features by WTRBA:

The Task Force shall make determinations concerning the construction of lateral drainage features to be constructed by the Basin Authority. During the time this Agreed Order is in effect, no lateral drainage feature shall be constructed by the Basin Authority until it has obtained bottomland hardwood easements for at least eighty percent (80%) of the woodlands and wetlands (as shown on Exhibit 3) which would have been affected by the lateral drainage features had the lateral drainage features been constructed in October of 1982. If the lateral drainage feature impacts land already under easement to satisfy the requirements of paragraph 5, then that number of acres may be applied against the 80% requirement. The lateral drainage features will be constructed in the manner determined by the Task Force and such construction will commence only after receipt by the Basin Authority of a letter of approval from the Task Force authorizing the particular work. The easements to be obtained by the Basin Authority shall be on forms in conformity with the easement form attached hereto as Exhibit 4.

The Task Force has the duty to determine the manner in which the lateral drainage features will be constructed by WTRBA and must issue a letter of approval to WTRBA authorizing the particular work. WTRBA cannot construct any lateral drainage feature until it has obtained bottomland hardwood easements for at least eighty percent (80%) of the woodlands and wetlands which would have been affected by the lateral drainage features had the lateral drainage features been constructed in October of 1982.

As stated earlier, the State was not a party to the litigation that resulted in the Consent Order in *Resor* and, therefore, WTRBA can proceed without the purchase of additional mitigation lands. In proceeding with the project on Stokes Creek, WTRBA has more than the obligation to obtain bottomland hardwood easements. It is also subject to the requirements specifically set forth in

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Paragraph 6 of the Agreed Order as well as all the general requirements of the Agreed Order.

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PAUL G. SUMMERS  
Attorney General

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MICHAEL E. MOORE  
Solicitor General

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SOHNIA W. HONG  
Assistant Attorney General

Requested by:

Betsy L. Child  
Commissioner  
401 Church Street  
Nashville, TN 37243